

**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

J U D G M E N T

S.B. CRIMINAL REVISION PETITION NO.63/2007
(Dr. Hanuman Dutt Bishnoi & Ors. Vs. State & Anr.)

**S.B. CRIMINAL REVISION PETITION
UNDER SECTION 397 READ WITH
SECTION 401 Cr.P.C. AGAINST THE
JUDGMENT DATED 21.12.2006 PASSED
BY LEARNED CHIEF JUDICIAL
MAGISTRATE, JALORE IN CRIMINAL
CASE NO.04/2007 – STATE VS
HANUMAN DUTT & OTHERS.**

DATE OF JUDGMENT : March 29th, 2007

P R E S E N T

HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. Vijay Purohit, for the petitioner.
Mr. JPS Choudhary, Public Prosecutor.

BY THE COURT : (PER HON'BLE MR. VYAS, J.)

The instant revision petition has been preferred by
the petitioners against the order dated 21.12.2006 passed by

learned Chief Judicial Magistrate, Jalore in Criminal Case No.04/2007 while praying that they may be acquitted from the charges levelled against them.

It is submitted by the learned counsel for the petitioners that a complaint was filed by the complainant – non-petitioner No.2 Mula Ram S/o Parkaji Chaudhary, resident of Village Khara, Tehsil Ahore, District Jalore against the petitioners alleging therein that her sister Smt. Matra died due to incompetency and gross negligence of doctors and prayed for enquiry. The said complaint was directly sent to the Hon'ble Home Minister, Govt. of Rajasthan, Jaipur, which was forwarded to the Superintendent of Police, Jalore for action. Upon which, a FIR No.170/2005 as registered against the petitioners at Police Station, Aahore for offence under Section 304A I.P.C.

According to the facts narrated in the FIR, it is alleged by the complainant that for the purpose of delivery of his sister – Smt. Matra, they reached to Primary Health Centre, Village Khaara on 23.7.2005 but ANM posted at Khaara told them that the condition of Smt. Matra is serious, therefore, she may be taken to the Government Hospital, Aahore. At about 11.30 a.m., they reached to Government Hospital, Aahore along with ANM of Primary Health Centre, Khaara but the Incharge of

the Government Hospital Dr. Smt. Rajesh Sharma told that it is closing time of the hospital, therefore, the patient may be taken to her residence where her husband Dr. Satya Prakash Shama is there and I am also reaching and they will treat the patient for the purpose of delivery. As per the above asking of Dr. Smt. Rajesh Sharma, Incharge, Govt. Hospital, Aahore, he took her sister to the residence of doctor, which is situated near the hospital. When they reached at her residence, her husband - Dr. Satya Prakash Sharma was there and Dr. Smt. Rajesh Sharma also reached there and after examination, Dr. Satya Prakash Sharma instructed him and his other family members to sit outside the quarter. They also prescribed some medicines, which he purchased from the market and gave to them. At about 2.30 p.m., it was informed by both the doctors that her condition is deteriorating and there is no possibility of having normal delivery. At that time, Khasa Ram - the brother in law of complainant told the doctors that if it is not possible for them to treat the patient for the purpose of delivery, then inform us, we will take her to the proper hospital for treatment. At that time, Dr. Satya Prakash Sharma and Dr. Smt. Rajesh Sharma informed that condition of patient is deteriorating, therefore, we have called Dr. Hanuman Dutt Bishnoi and Dr. Bishnoi is expert private doctor and he is having his Nursing Home. After sometime, Dr. Bishnoi reached and after examination of Smt.

Matra, he told that she may be shifted immediately to his Nursing Home because her condition is deteriorating. At that time, it was again requested by the complainant that if it is not possible for them to treat the patient, then ask us we will take her to Sumerpur but it was assured by the doctors that do not worry, we will treat the patient for the purpose of delivery. Then, the complainant party, brought Smt. Mantra to Bishnoi Nursing Home, Aahore. After sometime, it was informed by doctor, that Matra gave birth to a male child and her condition is good. At about 5.00 p.m., the complainant party saw that Dr. Bishnoi and Dr. Satya Prakash Sharma were talking secretly. At that time, upon enquiry, it was informed by the doctors that there is loss of blood of patient, therefore, we have arranged blood but before blood reached to the Hospital, patient Matra died. At that time, they brought the body of Matra to their house for cremation.

Upon above facts, after registration of the case, investigation commenced and after completion of investigation, a challan was filed under Section 304A of I.P.C. before the learned Additional Chief Judicial Magistrate, Jalore. On 1.8.2006, the case was listed for taking cognizance. At that stage, it was argued by the learned counsel appearing on behalf of the accused-persons before the trial court that there is no material

evidence on record to take cognizance against the petitioners. It was argued that according to the principle laid down by Hon'ble Supreme Court in the case of Jacob Mathew Vs. State of Punjab & Ors., reported in AIR 2005 S.C. 3180, no offence has been committed by the petitioners and, therefore, it was prayed that no cognizance can be taken against them for offence under Section 304-A I.P.C.

After hearing the arguments and taking into account the aforesaid decision of Hon'ble Supreme Court, the learned Magistrate sent the case back to the Investigating Officer for further investigation while exercising the power under Section 173 (8) Cr.P.C. Learned Magistrate while sending the matter back to the Investigating Officer also framed eight questions upon which the specific investigation was ordered to be made as per the aforesaid judgment of Hon'ble Supreme Court.

In pursuance of the order passed by learned Magistrate on 1.8.2006, the Investigating Officer referred the matter to the Medical Board for obtaining opinion on the questions along with entire record of the case. The Board was comprised of three expert doctors namely Dr. S.L. Mathur, Dr. V.C. Bhandari and Dr. Hemant Jain.

The Board gave its opinion that the conduct of all these doctors at the time of performing delivery was grossly rash and negligent. Thereafter, challan was again filed before the learned Magistrate along with the opinion of the Board as directed by the Magistrate concerned. After perusing the entire record of the case, and considering the judgment rendered by Hon'ble Supreme Court, the impugned order dated 21.12.2006 was passed whereby charges were framed against the petitioners for offence under Section 304-A I.P.C.

Learned counsel for the petitioners vehemently argued that in view of judgment rendered by Hon'ble Supreme Court in case of Jacob Mathew (supra), the action of the petitioners cannot be defined as rash and negligent act because they performed their duties as doctor and there is no evidence on record to show that there was any gross negligence on the part of the petitioners while giving medical treatment to late Smt. Matra. Learned counsel for the petitioners vehemently contended that the word 'gross' has not been used in Section 304-A I.P.C., so also to prosecute a medical professional for negligence under the criminal law, it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do.

The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent. Learned counsel for the petitioners while relying upon the aforesaid judgment contended that in the statement recorded under Section 161 Cr.P.C. before sending the case back for further investigation, the doctors of the Board stated that there was no negligence on the part of the petitioners. However, later on the same doctors gave their opinion that there was gross negligence on the part of the petitioners. Learned counsel for the petitioners, in support of his arguments, relied upon para No. 19 and 49 of the aforesaid judgment, which reads as follows :

"19. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariable be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give o can be understood to have

given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect, Judged by this standard, a professional may be held liable for negligence on one or two findings; either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent persons exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices. In Michael Hyde and Associates v. J.D. Williams and Co. Ltd., [2001] P.N.L.R. 233, CA, Sedley L.J. Said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard tht would be regarded as acceptable."

"49. We sum up our conclusions as under :-

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Tors, Ratanlal and Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach', and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of

professional negligence. A simple lack of care, an error of judgement or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions, which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings; either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam's case (1957) 1 WLR 582, 586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence."

While relying upon the judgment of Hon'ble Supreme Court as aforesaid, learned counsel for the petitioners prayed that there is no iota of evidence against the petitioners upon

which it can be said that they have committed any negligence and for which they can be prosecuted under Section 304A I.P.C.

Par contra, learned Public Prosecutor vehemently argued that in the present case, in whole of the investigation, there is prima-facie case that due to gross negligence on the part of the petitioners, a young lady died. It is also contended that knowingly well that facilities of experts nursing staff was not available in the Nursing Home, Dr. Bishnoi performed the delivery. It is also very strange that Dr. Bishnoi conducted forceps delivery while no blood was available in the Nursing Home. Likewise Deva Ram, one of the employees of the Bishnoi Nursing Home, has categorically stated in his statement recorded under Section 161 Cr.P.C. that he has not taken any training of nursing and likewise three other compounder, who are working there, do not possess requisite qualification and they are having only experience. Further, Dr. Bishnoi is only M.B.B.S. Meaning thereby, the Nursing Home was running without any qualified staff nor any facilities for operating a patient were available there. Even otherwise, there is prima facie evidence that Dr. Bishnoi has conducted the forceps delivery without arrangement of blood and other facilities. Therefore, it can be said that it is a case of gross negligence on the part of Dr. Bishnoi. Likewise, Dr. Smt. Rajesh Sharma, who

was posted at Govt. Hospital, Aahore directed the complainant to take Matra at her residence where her husband Dr. Satya Prakash Sharma was there and without any facilities at their residence, they retained Smt. Matra for near about three hours from 11.30 a.m. to 02.30 p.m. Similarly, when hospital was closed, then there was no question of asking the patient to come at residence for the purpose of delivery. It was within the knowledge of both the doctors that no delivery can be performed at their residence, though they retained Smt. Matra – deceased for near about three hours at their residence. Therefore, the case of gross negligence is clearly made out on their part. It is further contended by learned Public Prosecutor that the learned Magistrate sent the case back for expert opinion while following the principle laid down by Hon'ble Supreme Court in the case of Jacob Mathew (supra) and in pursuance of those directions, opinion was sought from the Broad and ultimately, the Board gave its opinion upon the points raised by the trial court and opined that there was gross rash and negligence on the part of the petitioners. Thus, the prosecution has rightly been launched against the petitioners and cognizance was rightly taken against them. Therefore, there is no error in the impugned order dated 21.12.2006.

I have considered the rival arguments of learned

counsel for the petitioners, learned Public Prosecutor and gone through the entire record of the case as well as the judgment rendered by Hon'ble Supreme Court in case of Jacob Mathew (*supra*).

It is true that in the aforesaid judgment, Hon'ble Supreme Court has held that a mere deviation from normal professional practice is not necessarily evidence of negligence. Likewise, a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se. But at the time of arriving at with the finding or conclusion that a negligence has been committed by a professional, the whole facts are required to be taken into account. The Hon'ble Supreme Court has considered this aspect of the matter in para 26 of the aforesaid judgment. It has also been observed in para 27 of aforesaid judgment that no sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. It has further been observed that a single failure may cost him dear in his career. The Hon'ble Supreme Court further observed in para 27 of the aforesaid judgment that simply because a patient has not favourable responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by

applying the doctrine of *res ipsa loquitur*. In para 29 of the aforesaid judgment, Hon'ble Supreme Court observed that a medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. Meaning thereby, it is necessary for a complainant to adduce evidence that there was negligence on the part of the medical practitioner, if any complaint is filed by him against a medical practitioner. Thus, in the case in hand, it is necessary to consider certain points whether any evidence is on record against the petitioners on the basis of which they can be prosecuted.

I have given my thoughtful consideration to the entire record of the case. It is obvious from the facts that patient Smt. Matra was brought to the Primary Health Centre, Khaara where ANM asked the complainant party that her condition is not good, therefore, she may be taken to the Government Hospital, Aahore. Thereafter, complainant party along with Smt. Matra and ANM reached to the Government Hospital, Aahore where Dr. Smt. Rajesh Sharma was posted. It is very strange that when there was emergency, the patient has

to be treated in hospital itself but while saying that now it is closing time therefore, Dr. Smt. Rajesh Sharma directed the complainant party to take the patient to her residence where her husband Dr. Satya Prakash Sharma was there and from the evidence on record, it is clear that no medical facilities were available in the government quarter for treatment. Likewise, it is also very strange that if there were no medical facilities, then why the patient was retained in the quarter for three hours upto 2.30 p.m. and why a private doctor (Dr. Bishnoi) was called by the doctors of Government Hospital. Further, if the condition of patient was deteriorating, then, obviously, it was the duty of the petitioners to refer the patient to a nearby better equipped government hospital where the patient may be medically operated properly and be given proper treatment. But, it has not been done by the petitioners and without any consent of the complainant party, they called Dr. Bishnoi, who is running a private Nursing Home at Aahore. Further, it is clear from the opinion of the Board that there was no blood available in the Nursing Home at the time of performing forceps delivery of deceased Matra. More so, no qualified staff was there in the Nursing Home at that time. Thus, it is clear that the Board has rightly opined that there was negligence on the part of the petitioners. Thus, in my opinion, there is a clear-cut prima facie case against the petitioners, which does require

prosecution. In this view of the matter, learned Magistrate has rightly passed the impugned order, which does not warrant any interference by this Court.

Accordingly, the revision petition is dismissed.

(GOPAL KRISHAN VYAS) J.